IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MRS. JUSTICE K.HEMA

WEDNESDAY, THE 28TH MARCH 2007 / 7TH CHAITHRA 1929

Crl.Rev.Pet.No. 523 of 1999()

CRA.30/1998 of ADDL.SESSIONS COURT, PARAVUR
ST.530/1996 of JUDL.MAGISTRATE OF FIRST CLASS, PERUMBAVOOR
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PETITIONER(S): IST APPELLANT/ IST ACCUSED

CHERIACHAN, S/O.DEVASSY,
KOLATTUKUDY VEEDU,
VADAKKUMBHAGAM KARA,
MANJAPRA VILLAGE.

BY ADV. SRI.P.T.JOSE

RESPONDENT(S): RESPONDENT/ COMPLAINANT

STATE OF KERALA, REPRESENTED BY
THE EXCISE RANGE INSPECTOR,
KALADY.

BY PUBLIC PROSECUTOR SRI.C.K.SURESH

THIS CRIMINAL REVISION PETITION HAVING BEEN FINALLY HEARD ON 28/03/2007, THE COURT ON THE SAME DAY PASSED THE FOLLOWING:

ORDE RON CMP. NO.2246/1999 IN CRRP. NO.523/1999

DISMISSED

28/03/2007 **SD/- K.HEMA, JUDGE**

TRUE COPY

P.A. TO JDUGE

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K. HEMA, J.

CRL. R.P. No.523 OF 1999

Dated this the 28th day of March, 2007.

O R D E R

Revision petitioner is the first accused in the case. He was tried along with second accused for offence under Section 58 of Abkari Act before Judicial Magistrate of First Class. Both the accused were convicted and sentenced to undergo simple imprisonment for a period of six months each under Section 58 of Abkari Act and also sentenced to pay a fine of Rs. 15,000/- each and in default to undergo simple imprisonment for a period of six months each. In appeal, second accused was acquitted. But, the conviction and sentence passed against first accused were confirmed by learned Additional Sessions Judge. This revision is filed against the said conviction and sentence.

2. According to prosecution, both the accused knowingly possessed and transported 50 litres of illicit arrack in five cans in an autorickshaw, which were kept in the platform of passenger seat. The offence was detected by PW1 on 19.08.1995 at about 8 p.m while he was on patrol duty along with the party including PW3, Assistant Excise Inspector. On suspicion, autorickshaw was stopped on signal and on examination it was found that five cans containing arrack were kept in the platform of autorickshaw at the back side where the revision petitioner (first accused) was sitting as a passenger. The cans were seized under a mahazar, Exhibit P1. Accused were released on bail by Excise Officials. After investigation, occurrence

report Ext. P2 was submitted before Magistrate's Court.

3. PWs 1 to 3 were examined, Exhibits P1 to P3 and M.O.1 series were marked on the side of prosecution. Accused did not adduce any evidence. But, he put forward a defence plea that he was falsely implicated at the instance of one Baby who is conducting business in liquor in the nearby place. It is the case of accused that a worker under Baby wanted certain cans to be loaded into autorickshaw. But, the driver objected to this and there was a quarrel between them. People gathered and Excise party came to the spot and took all the persons into custody including the said Joy. Later at the instance of Baby, Joy was let out and only accused 1 and 2 were proceeded against.

4. On an analysis of evidence on record, both the courts found that PWs 1 and 3 who are Excise Officials can be believed. PW2 is an independent witness, who signed in the mahazar as an attestor, turned hostile to the prosecution and supported the defence version to certain extent. Reliance was placed on the evidence of PWs 1 and 3 and also the evidence of PW2, who admitted the signature in Ext. P1 mahazar and also stated that Excise Inspector seized the autorickshaw from the scene of occurrence, though he is denied having seen PW1 seizing any contraband article from autorickshaw.

5. Lower appellate court found that there is nothing in evidence as to why PWs 1 and 3 were motivated to arrest accused and implicate petitioner in a false case. It was also held that there was no attempt to prove the defence case by examining witnesses. It was on these premises

that PWs 1 and 3 were believed and a conviction was entered against revision petitioner. It is true that accused could not prove the defence version. He did not examine a witness. But, specific motive was alleged against Excise Officials in falsely implicating a case against him. Accused has a definite case that though the case was originally registered against him and also Joy, subsequently manipulations were done and Joy was let out. It has been brought out from evidence that Baby had come to Excise office in connection with abkari business and PW1 is acquainted with him. It is stated by PW2 that on the next day of the incident Baby was seen in the excise office.

6. The above facts must guard the court to analyze the evidence of excise officials with greater care and caution. What the court is to look into is whether the prosecution has proved its case beyond reasonable doubt or not. To arrive at such a finding, the court has to analyze the evidence against the touch stone of various facts and circumstances and materials brought out in evidence and come to a conclusion whether prosecution's case can be accepted or not. On going through the judgment of lower appellate court, I find that there was no such exercise done by lower appellate court.

7. It is held by lower appellate court that, "PW1 prepared Ext. P1 seizure mahazar and made samples. PW3 is the Assistant Excise Inspector who accompanied PW1. In all material particulars PW3 has corroborated PW1".

8. On going through the evidence I find that this finding is not

supported by evidence. But, the evidence is contradictory to such finding. PW1 did not say that he prepared Ext. P1 mahazar. No where in the evidence of PW1 a statement is made that Ext. P1 was prepared by him. He only identified the mahazar as Ext. P1. But, failed to state before court that the said mahazar was prepared by him. In the absence of any such evidence to the fact that Ext. P1 was prepared by PW1, the court ought not to have entered a finding that PW1 prepared Ext. P1 mahazar. Regarding this aspect, evidence of PW3 has not been corroborated by the evidence of PW1 as revealed from his evidence. PW3 stated that Ext. P1 was prepared under the instructions from "Sub Inspector" at the Excise range office. He also stated that the Sub Inspector himself has written the mahazar by sitting on a stool at the place of occurrence.

9. Though the prosecution case is that PW1 has prepared the mahazar, PW1 has not given evidence to that effect. But, PW3 gave evidence that mahazar was prepared by Sub Inspector personally. At one context PW3 would state that the mahazar was prepared at the scene of occurrence, whereas in another context he stated that the mahazar was prepared at the Excise Range office. In this connection, evidence of PW2 is also relevant. PW2 deposed that the mahazar was signed by him on the next day of the incident, which was witnessed by him at the Excise office. Therefore, evidence regarding preparation of Ext.P1 is shabby.

10. Lower appellate court held that in all material particulars PW3 corroborated the evidence of PW1. This is not correct. PW1 stated in cross-

examination that samples were taken from five cans at the place of occurrence in the presence of witnesses. But, evidence of PW3 would reveal that no such sample was taken from the spot. On the other hand, he gave evidence that all the five cans in which arrack was seen were sealed and a mahazar was prepared and those were taken to the Excise office. Therefore, evidence regarding material aspect with respect to drawing of sample from the spot is contradictory.

11. It is also relevant to note that PW1 was totally silent regarding drawing of any sample from the spot while he was examined in court. Even though it was brought out in cross examination that samples were taken from five cans at the spot, it had not been stated by him that the samples were sealed at the spot. Ext. P1 mahazar will also not disclose that samples were sealed at the spot. There is no specific recital in Ext. P1 to the effect that samples were sealed from the spot. PW1 in the cross examination deposed that sealing was done by office staff in his presence, where as PW3 deposed that cans were sealed from the spot itself. The evidence of PW1 regarding sealing of cans is contradictory to the evidence of PW3. Inspite of all these major contradictions regarding sealing, sampling, place of sealing, person who has sealed the cans etc., both the courts found that PWs 1 and 3 corroborated each other in all material particulars.

12. It is needless to say that in an offence of this nature, place of occurrence assumes significance. As per the mahazar, incident happened at "Mattannur junction". But, PW1, who prepared Ext. P1, deposed that there is

no particular name for junction. Though in Ext. P1 which is signed by PW1, the incident is stated to have happened at the Mattannur junction, he deposed that the incident happened 3 kilometers away from the junction. The contents of Ext. P1 are thereby given up by PW1 himself.

13. Now coming to the evidence of PW3 it can be seen that he stated that incident happened in "Kavalur junction", which is contradictory to the version given by PW1 at the time of evidence. Therefore, PWs 1 and 3 contradicted each other in evidence even with respect to the place where the incident occurred. Their evidence can only be stated to be shabby regarding the place of occurrence, the manner in which the articles were seized, the person who prepared the mahazar, the place where the mahazar was prepared, the place where the cans were sealed, the persons who sealed the cans, the manner in which the sample was drawn etc.

14. Significantly, both PW1 and PW3 are silent regarding the sealing of the sample. Hence, there is no guarantee whether sample would be tampered with or not. In this case, prosecution has not established by satisfactory evidence that samples which were drawn from the article allegedly seized from the possession of accused were sealed in the presence of witnesses as alleged by the prosecution. In the above circumstances, in the absence of satisfactory proof for the fact that samples analysed in this case were taken from the articles seized from the possession of accused, accused cannot be made liable for possession of liquor as alleged by the prosecution. This fact has not been considered by trial court and lower

appellate court. Unless the prosecution proves that the article seized from the possession of accused is liquor, no conviction can be entered against him.

15. Apart from all these, the requirements of Section 58 are not proved. Mere possession of liquor is not an offence under Section 58, but prosecution must prove that accused had the requisite knowledge. In the above circumstances, I find that the prosecution failed to establish offence under Section 58 is committed by the accused and hence conviction and sentence passed against him are unsustainable.

In the result, the conviction and sentence passed against petitioner are set aside. Revision petitioner is found not guilty and he is acquitted of offence under Section 58 of Abkari Act . He is set at liberty forthwith.

This revision petition is allowed.

K. HEMA, JUDGE

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